

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

IN RE PHARMACEUTICAL INDUSTRY
AVERAGE WHOLESALE PRICE
LITIGATION

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)
) MDL NO. 1456
) Civil Action No. 01-12257-PBS
)

THIS DOCUMENT RELATES TO:

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)
) *The City of New York v. Abbott Labs., et al.*
) (S.D.N.Y. No. 04-CV-06054)
)

)
) *County of Nassau v. Abbott Labs, et al.*
) (E.D.N.Y. No. 04-CV-5126)
)

)
) and other cases listed on the following page
)

) Judge Patti B. Saris

**SEPARATE MEMORANDUM OF DEFENDANT BEN VENUE LABORATORIES, INC.,
IN SUPPORT OF ITS MOTION TO DISMISS THE NASSAU COUNTY
SECOND AMENDED COMPLAINT**

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***Attorneys for Defendant:
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THIS DOCUMENT RELATES TO:)	<i>County of Herkimer v. Abbott Labs, et al.</i>)
)	(N.D.N.Y. No. 05-CV-00415))
<i>The City of New York v. Abbott Labs., et al.</i>	)	<i>County of Oneida v. Abbott Labs, et al.</i>)
(S.D.N.Y. No. 04-CV-06054)	)	(N.D.N.Y. No. 05-CV-00489))
<i>County of Suffolk v. Abbott Labs., et al.</i>	)	<i>County of Fulton v. Abbott Labs, et al.</i>)
(E.D.N.Y. No. CV-03-229)	)	(N.D.N.Y. No. 05-CV-00519))
<i>County of Westchester v. Abbott Labs., et al.</i>	)	<i>County of St. Lawrence v. Abbott Labs, et al.</i>)
(S.D.N.Y. No. 03-CV-6178)	)	(N.D.N.Y. No. 05-CV-00479))
<i>County of Rockland v. Abbott Labs., et al.</i>	)	<i>County of Jefferson v. Abbott Labs, et al.</i>)
(S.D.N.Y. No. 03-CV-7055)	)	(N.D.N.Y. No. 05-CV-00715))
<i>County of Putnam v. Abbott Labs, et al.</i>	)	<i>County of Lewis v. Abbott Labs, et al.</i>)
(S.D.N.Y. No. 05-CV-04740)	)	(N.D.N.Y. No. 05-CV-00839))
<i>County of Dutchess v. Abbott Labs, et al.</i>	)	<i>County of Chautauqua v. Abbott Labs, et al.</i>)
(S.D.N.Y. No. 05-CV-06458)	)	(W.D.N.Y. No. 05-CV-06204))
<i>County of Putnam v. Abbott Labs, et al.</i>	)	<i>County of Allegany v. Abbott Labs, et al.</i>)
(S.D.N.Y. No. 05-CV-04740)	)	(W.D.N.Y. No. 05-CV-06231))
<i>County of Washington v. Abbott Labs, et al.</i>	)	<i>County of Cattaraugus v. Abbott Labs, et al.</i>)
(N.D.N.Y. No. 05-CV-00408)	)	(W.D.N.Y. No. 05-CV-06242))
<i>County of Rensselaer v. Abbott Labs, et al.</i>	)	<i>County of Genesee v. Abbott Labs, et al.</i>)
(N.D.N.Y. No. 05-CV-00422)	)	(W.D.N.Y. No. 05-CV-06206))
<i>County of Albany v. Abbott Labs, et al.</i>	)	<i>County of Wayne v. Abbott Labs, et al.</i>)
(N.D.N.Y. No. 05-CV-00425)	)	(W.D.N.Y. No. 05-CV-06138))
<i>County of Warren v. Abbott Labs, et al.</i>	)	<i>County of Monroe v. Abbott Labs, et al.</i>)
(N.D.N.Y. No. 05-CV-00468)	)	(W.D.N.Y. No. 05-CV-06148))
<i>County of Greene v. Abbott Labs, et al.</i>	)	<i>County of Yates v. Abbott Labs, et al.</i>)
(N.D.N.Y. No. 05-CV-00474)	)	(W.D.N.Y. No. 05-CV-06172))
<i>County of Saratoga v. Abbott Labs, et al.</i>	)	<i>County of Niagara v. Abbott Labs, et al.</i>)
(N.D.N.Y. No. 05-CV-00478)	)	(W.D.N.Y. No. 05-CV-06296))
<i>County of Columbia v. Abbott Labs, et al.</i>	)	<i>County of Seneca v. Abbott Labs, et al.</i>)
(N.D.N.Y. No. 05-CV-00867)	)	(W.D.N.Y. No. 05-CV-06370))
<i>Essex County v. Abbott Labs, et al.</i>	)	<i>County of Orleans v. Abbott Labs, et al.</i>)
(N.D.N.Y. No. 05-CV-00878)	)	(W.D.N.Y. No. 05-CV-06371))
<i>County of Chenango v. Abbott Labs, et al.</i>	)	<i>County of Ontario v. Abbott Labs, et al.</i>)
(N.D.N.Y. No. 05-CV-00354)	)	(W.D.N.Y. No. 05-CV-06373))
<i>County of Broome v. Abbott Labs, et al.</i>	)	<i>County of Schuyler v. Abbott Labs, et al.</i>)
(N.D.N.Y. No. 05-CV-00456)	)	(W.D.N.Y. No. 05-CV-06387))
<i>County of Onondaga v. Abbott Labs, et al.</i>	)	<i>County of Chemung v. Abbott Lab, et al.</i>)
(N.D.N.Y. No. 05-CV-00088)	)	(W.D.N.Y. No. 05-CV-06744))
<i>County of Tompkins v. Abbott Labs, et al.</i>	)	and)
(N.D.N.Y. No. 05-CV-00397)	)	<i>County of Nassau v. Abbott Labs, et al.</i>)
<i>County of Cayuga v. Abbott Labs, et al.</i>	)	(E.D.N.Y. No. 04-CV-5126))
(N.D.N.Y. No. 05-CV-00423))		
<i>County of Madison v. Abbott Labs, et al.</i>)		
(N.D.N.Y. No. 05-CV-00714))		
<i>County of Cortland v. Abbott Labs, et al.</i>)		
(N.D.N.Y. No. 05-CV-00881))		

Defendant Ben Venue Laboratories, Inc. (“Ben Venue”) submits this separate memorandum in support of its motion to dismiss the Second Amended Complaint of Nassau County (the “Nassau Complaint” or “Nassau Cmplt.”). Ben Venue also joins in Defendants’ Joint Memorandum of Law in Support of Motion to Dismiss the Complaints which explains why the claims asserted in the Consolidated Complaint of New York City and Plaintiff New York Counties Other Than Nassau (the “Consolidated Complaint”) and the Nassau Complaint should be dismissed as to all defendants as a matter of law. In addition, Ben Venue joins Defendant Sandoz Inc.’s Supplemental Memorandum of Law Regarding Multiple Source Generic Drug Products In Support of Defendants’ Motion to Dismiss the Complaints. Ben Venue submits this separate memorandum to specifically highlight the failure of the Nassau Complaint to state a claim against Ben Venue upon which relief can be granted.

ARGUMENT

The Nassau Complaint Fails to State a Claim Against Ben Venue Upon Which Relief Can be Granted

The Nassau Complaint specifically states that Exhibit B “lists the specific drugs for which Nassau County seeks relief....” (Nassau Cmplt. ¶ 317). The Nassau Complaint goes on to state that “[f]or each Boehringer Group drug identified in Exhibit B, Nassau County alleges that Boehringer Group published intentionally false and misleading wholesale price information, including an intentionally and false and misleading AWP.” *Id.* Exhibit B of the Nassau Complaint does not list *a single* Ben Venue drug. Therefore, the Nassau Complaint does not seek relief for any drugs manufactured by Ben Venue, and Ben Venue must be dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

CONCLUSION

For this reason and those articulated in the Joint Memorandum and the Sandoz Memorandum, the Consolidated Complaint and the Nassau Complaint should be dismissed as to Ben Venue Laboratories.

Respectfully submitted,

Defendant
BEN VENUE LABORATORIES, INC.

Dated: March 3, 2006

/s/ Lee M. Holland

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CERTIFICATE OF SERVICE

I, Brian P. Kavanaugh, hereby certify that on March 3, 2006, I caused a true and correct copy of the foregoing, **Separate Memorandum of Ben Venue Laboratories, Inc. in Support of its Motion to Dismiss**, to be served on all counsel of record in accordance with the Court's Case Management Order No. 2.

Dated: March 3, 2006

/s/ Brian P. Kavanaugh